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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-11

ROOSEVELT F. PALMORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON APPEAL FROM
THE DISTRICT OF COLUMBIA COURT OF APPEALS

MOTION OF UNITED STATES TO DISMISS OR AFFIRM

OPINION BELOW

The opinion of the District of Columbia Court of Appeals (J. S. App. 1-21) is reported at 290 A. 2d 573.

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on April 28, 1972. On June 30, 1972, the jurisdictional statement was filed. The

jurisdiction of this Court is invoked under 28 U.S.C. 1257(2); alternative jurisdiction is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether the Superior Court of the District of Columbia can constitutionally be vested with jurisdiction to try a felony prosecution brought under the District of Columbia Code.

2. Whether the evidence against appellant was obtained as the result of an unlawful search and seizure.

CONSTITUTIONAL PROVISIONS INVOLVED

Art. I, § 8 provides, in pertinent part:

> The Congress shall have the Power * * * To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States * * *;
>
> And
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers * * *.

Art. III provides, in pertinent part:

> Section 1. The judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges,

both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law, and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

STATEMENT

After trial in the Superior Court of the District of Columbia, appellant was convicted of the felony of carrying an unregistered pistol after having previously been convicted of a felony, in violation of D.C. Code § 22-3204.[1] The pistol was discovered when the automobile appellant was driving was stopped by

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[1] The statute provides that violation of its provisions shall be punished as a misdemeanor under D.C. Code § 22-3215 unless the defendant has previously been convicted of a felony, in which case he is liable to imprisonment for up to ten years.

plainclothes police officers for a spot check. The officers had recognized from the license tags that the vehicle was rented and they had decided to conduct the spot check to determine whether appellant had a proper license and rental agreement. While one officer talked to appellant and examined his license and the apparently expired rental agreement, the other glanced into the interior of the vehicle with the assistance of a flashlight. Noticing the pistol protruding from under the front armrest, he removed it and—upon ascertaining that it was unregistered—arrested appellant.

Prior to trial, appellant moved to dismiss the indictment on the ground that the Superior Court, having been established pursuant to Article I, § 8, cl. 17 of the Constitution, lacked jurisdiction to try him for a felony; his claim was that only a court created under Article III of the Constitution has jurisdiction over a felony proscribed by Congress and prosecuted in the name of the United States. He also moved to suppress the pistol on the ground that it was discovered as the result of an unlawful search. Both motions were denied. The District of Columbia Court of Appeals affirmed the conviction.

ARGUMENT

1. Pursuant to Rule 16(1)(a) of the Rules of this Court, the United States moves to dismiss the appeal on the ground that it is not within the juris-

diction of the Court.[2] Although appellant contends (J.S. 2-6) that this Court has jurisdiction to hear his appeal under 28 U.S.C. 1257(2), that provision confers jurisdiction only over decisions "where is drawn in question the validity of a statute of any state * * *," whereas the Act challenged by appellant, the District of Columbia Court Reorganization Act of 1970, P. L. 91-358, 84 Stat. 475, is a statute of the United States. See *e.g.*, *Baltimore & Potomac R. Co.* v. *Hopkins*, 130 U.S. 210.

Contrary to appellant's contention (J.S. 3-5), in enacting the Court Reorganization Act Congress did not intend to treat federal statutes pertaining exclusively to the District of Columbia as state statutes for purposes of Section 1257. When Congress intended that its statutes be treated as statutes of a state it expressly so stated. See 28 U.S.C. 1363. The policy considerations appellant offers as reasons for treating such federal statutes as state statutes for purposes of obtaining review under Section 1257 should therefore be addressed to the Congress and not to this Court.

Review of the judgment below therefore may properly be secured only by a writ of certiorari pursuant to 28 U.S.C. 1257(3). Accordingly, we believe the proper course is for this Court to treat the jurisdictional statement as a petition for a writ of certiorari. See 28 U.S.C. 2103, 2113; see, also, J.S. 6, n. 9.

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[2] If the court should conclude, contrary to the following argument, that it has jurisdiction to entertain an appeal, we move in the alternative that the judgment below be summarily affirmed. See Rule 16(1) of the Rules of this Court.

2. Appellant[a] contends (J.S. 13-19) that the District of Columbia Superior Court lacked jurisdiction to try his prosecution for a felony under the District of Columbia Code.[b] Appellant's argument starts with the fact that the judges of that court by statute have limited tenure and no protection against reductions in salary, and that the Superior Court is a legislative court established under Article I of the Constitution. The key contention, however, is that only a court established under Article III can be given jurisdiction to try a felony prosecution brought under an act of Congress which pertains exclusively to the District of Columbia. The court below fully considered and properly rejected this argument and its judgment warrants no further review.

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[a] In order to preserve consistency, the defendant below will continue to be styled herein as "appellant" even though his jurisdictional statement is viewed as a petition for a writ of certiorari.

[b] Appellant assumes that as a criminal defendant he has standing to assert an alleged deprivation of Article III guarantees of judicial salary and tenure. Such standing apparently was acknowledged in *Glidden Company* v. *Zdanok*, 370 U.S. 530, 533. But the basis of the litigants' rights to assert an Article III claim was not there fully articulated and remains unclear. For example, we know of no suggestion that the judgment of a federal trial or appellate court should be regarded as void on the ground that one of the judges was sitting as an unconfirmed recess appointee, even though such appointees do not yet enjoy Article III protection. See *United States* v. *Allocco*, 305 F. 2d 704, 709 (C.A. 2), certiorari denied, 352 U.S. 931. Compare *O'Donoghue* v. *United States*, 289 U.S. 516, a case on which appellant heavily relies, where the issue of Article III status was raised by District of Columbia judges whose salaries were being reduced.

It has long been recognized that Congress may, in the exercise of certain of its Article I and Article IV powers, establish courts not subject to the jurisdictional limitations, and whose judges are not entitled to the tenure and salary benefits, prescribed by Article III. *E.g., American Insurance Co.* v. *Canter*, 1 Pet. 511; *Ex parte Bakelite Corp.*, 279 U.S. 438. Contrary to appellant's statement (J.S. 17) this Court has expressly held that such legislative courts may be vested with "judicial power." *Williams* v. *United States*, 289 U.S. 553, 565-566.*

Appellant's references to the historic misdemeanor jurisdiction of the local District of Columbia courts as merely involving "municipal, police, and legislative power" (J.S. 16) obscure the important fact that these legislative courts (and others) have long exercised true judicial power. Perhaps the basic fallacy in appellant's position is the assumption that all judicial enforcement of rights and responsibilities created by Act of Congress must be entrusted to Article III courts exercising the "judicial power of the United States." This is erroneous, since, for example, state court judges lacking Article III protections frequently decide the federal rights and obligations of litigants —subject always, as with the District of Columbia local courts, to ultimate review by this Court.

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* Although a plurality of the Court in *Glidden Company* v. *Zdanok*, 370 U.S. 530, noted disapproval of the results in *Bakelite* and *Williams*, these cases have not been overruled and the propositions for which they are cited here were not controverted in *Glidden*.

The real issue in this case is whether the jurisdiction conferred on the District of Columbia Superior Court was properly within the Article I powers of Congress "[t]o exercise exclusive Legislation in all Cases whatsoever [in the District of Columbia]" and "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers * * *." But this issue has been decided against appellant, for a majority of this Court acknowledged in *National Mutual Insurance Co.* v. *Tidewater Transfer Co., Inc.*, 337 U.S. 582, that Congress may confer judicial power upon the courts of the District of Columbia in the exercise of its Article I powers over the District. And see Note, *Legislative and Constitutional Courts: What Lurks Ahead for Bifurcation*, 71 Yale L.J. 979, 991-992.*

Appellant urges that *O'Donoghue* v. *United States*, 289 U.S. 516, stands for the proposition that "the courts sitting in the District of Columbia exercise the judicial power conferred by Article III of the Constitution, and that the judges of the courts in the District of Columbia are accordingly entitled to the protections of Article III" (J.S. 17). However, this Court in *O'Donoghue* never suggested that Congress lacked power to establish an Article I court system for the District of Columbia. The question in *O'Donoghue* was only whether the old Supreme Court and Court of Appeals of the District of Colum-

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* Also see *O'Donoghue* v. *United States*, 289 U.S. 516, 545, where it was noted that Congress has plenary power under Article I to clothe District of Columbia courts "with such authority as a State may confer on her courts."

bia had in fact been established under Article III. In deciding that the courts there had been so established, the Court noted that their jurisdiction completely overlapped that of other federal district courts[1] and that the legislative history and statutory enabling language was consistent with a Congressional purpose to exercise Article III rather than Article I powers. The Court noted that there was no intent by Congress to have the cession of territory from Virginia and Maryland strip the residents of the District of Columbia of "the right to have their cases arising under the Constitution heard and determined by federal courts created under, and vested with the judicial power conferred by, Article III." 289 U.S. at 540. The Court's concern was that residents of the District of Columbia not be relegated to a lower status than Article III would afford them in Virginia or Maryland, or elsewhere.

But this analysis makes clear that *O'Donoghue* applies only where the very existence of the court must depend only on Article III, for quite evidently neither in that case nor elsewhere has this Court intimated that all suspects charged with "local-type felonies" must be tried before Article III judges. All Congress has sought to do in the 1970 Court Reorganization Act is to establish a local court system, comparable to those in states, that is distinct from the "federal courts" established in the District of Columbia and elsewhere under Article III. *O'Dono-*

[1] Full federal jurisdiction in the District of Columbia is now vested not in the District of Columbia courts but in the United States District Court and the United States Court of Appeals.

ghue cannot fairly be read to imply that congressional power under the District Clause of Article I to achieve this sound and modest result is lacking.

There is no historical or constitutional reason why the judicial power of Article I courts in the District of Columbia cannot extend to the administration of criminal justice. Indeed, as appellant concedes (J.S. 16, n. 27), the Court of General Sessions (the predecessor of the Superior Court) has for many years properly exercised jurisdiction over acts made offenses or misdemeanors by Act of Congress. Yet there is no constitutional basis for distinguishing between misdemeanor jurisdiction and jurisdiction over local felonies, *i.e.*, felonies under congressional statutes pertaining exclusively to the District of Columbia. Cf. *Argersinger* v. *Hamlin*, No. 70-5015, decided June 12, 1972. Thus it was well within the Article I powers of Congress to grant the Superior Court jurisdiction over local felonies. See *Lurk* v. *United States*, 296 F. 2d 360 (C.A. D.C.), affirmed on other grounds, 370 U.S. 530.

3. Appellant's Fourth Amendment claim (J.S. 20-25) raises no substantial question warranting review.[8] The opinion of the court below on this issue, on which we primarily rely, properly concluded that the officers here had "authority * * * to stop appellant for the sole purpose of asking him for his driving permit

[8] Appellant acknowledges that this claim is incapable independently of sustaining an appeal under 28 U.S.C. 1257 (J.S. 5-6). Thus this issue remains within certiorari jurisdiction. See *Mishkin* v. *New York*, 383 U.S. 502, 512-513.

and auto rental agreement," that upon his failure to show an unexpired agreement the officers "were entitled to detain him until the rightful ownership and use of [the] car could be clarified", that the need for safety made it reasonable for one of the officers to shine his flashlight into the car, and that in such circumstances the seizure of a pistol in plain view was not violative of the Fourth Amendment (J.S. App. 17).

The selective stopping of motor vehicles upon public highways to determine if the driver has the necessary permit and registration documents in his possession is an appropriate means for enforcing the common statutory requirements that drivers possess such documents when operating vehicles and exhibit them to police officers upon demand. See D.C. Code §§ 40-104(a)(1), 40-301(c); see also J.S. 24, n. 42, for a list of comparable state statutes. Given the threat to public safety created by the use of our highways by persons who have not been properly licensed or whose licenses have been suspended or revoked, and given the minimal intrusion that is involved, the practice followed in the present case is reasonable under the Fourth Amendment.

We know of no decisions holding either that officers must have an articulable basis for suspicion before they may stop vehicles for spot checks of this kind or that such stops made in good faith, as found below (J.S. App. 15-17), violate the Fourth Amendment. The decisions cited by appellant as in conflict with the ruling below (J.S. 24-25) are not. Neither

United States v. *Madril*, 445 F. 2d 827 (C.A. 9), nor *United States* v. *Fallon*, 457 F. 2d 15 (C.A. 10), nor *United States* v. *Thompson*, 420 F. 2d 536 (C.A. 3), was concerned with a "spot check" and in distinct contexts the courts found other automobile interceptions justified. Spot checks to ascertain whether operators are licensed to drive are, in light of circumstances like those here, reasonable as well.

CONCLUSION

It is therefore respectfully submitted that the appeal should be dismissed for lack of jurisdiction and, treating the jurisdictional statement as a petition for a writ of certiorari, that the petition should be denied. In the alternative, should the Court conclude that it has jurisdiction of the appeal, the judgment below should be affirmed.

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AUGUST 1972.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1972 474194 73